

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RICHARD D. REHAK,)	
)	No. 07-1314-HU
Plaintiff,)	
)	
v.)	
)	OPINION AND ORDER
)	
)	
WEST AMERICAN INSURANCE,)	
COMPANY,)	
)	
Defendant.)	

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HUBEL, Magistrate Judge:

Plaintiff Richard Rehak brings this action against his
insurer, West American Insurance Company, requesting declaratory

1 relief on the issue of whether the uninsured/underinsured motorist
2 provision of a commercial policy issued to his business, Surefire
3 Construction, covers an accident in which he was injured. Both
4 parties move for summary judgment.

5 **Factual Background**

6 Plaintiff Richard Rehak (plaintiff Rehak) is the sole
7 shareholder and president of an Oregon corporation, Surefire
8 Construction, Inc. (Surefire). CSF ¶ 1. Surefire has three vehicles
9 insured by defendant West American Insurance Company (West). The
10 vehicles are a van, a flatbed truck, and a 1995 Ford pickup that is
11 regularly used by plaintiff Rehak for commuting and transporting
12 supplies to job sites. The pickup is leased by plaintiff Rehak's
13 father. CSF ¶¶ 4, 5.

14 Plaintiff Rehak and his brother, John Rehak, an employee of
15 Surefire, frequently drove together to a Surefire job site in The
16 Dalles in the 1995 Ford pickup, although sometimes they drove
17 independently. CSF ¶ 4. Plaintiff Rehak did not use the 1995 Ford
18 pickup as a personal vehicle. Affidavit of Richard Rehak ¶ 9. On a
19 few occasions before October 13, 2004, plaintiff Rehak and John
20 Rehak used John Rehak's personal vehicle, a 1998 GMC Jimmy, to
21 drive to and from The Dalles when the 1995 Ford pickup was not
22 available. CSF ¶ 4.

23 On October 13, 2004, the 1995 Ford pickup was being repaired
24 in Vancouver, Washington. CSF ¶ 6. Plaintiff Rehak asked John Rehak
25 if they could use John Rehak's Jimmy to drive to the job site. CSF
26 ¶ 6. They agreed that Surefire would pay for the gas and compensate

1 John Rehak for mileage. Id. Plaintiff Rehak drove John Rehak's
2 Jimmy to the jobsite, with John Rehak as a passenger. Affidavit of
3 Richard Rehak ¶ 15.

4 After plaintiff Rehak and John Rehak arrived at the work site
5 in The Dalles, they left the site to drive to Home Depot. Plaintiff
6 Rehak states that he had instructed his brother to go to the Home
7 Depot store in The Dalles so that they could purchase nails and
8 screws that were needed at the jobsite. Affidavit of Richard Rehak
9 ¶ 17. John Rehak was driving the Jimmy and plaintiff Rehak was a
10 passenger. On the way, an accident occurred. CSF ¶ 7. Both Rehaks
11 were injured. Affidavit of Richard Rehak ¶ 18; CSF ¶ 8. The other
12 driver was at fault in the accident. Affidavit of Richard Rehak ¶
13 18. Plaintiff Rehak was paid the full liability limits of the other
14 driver's policy, \$25,000 and also received \$25,000 from John
15 Rehak's personal automobile insurer, American Commerce Insurance
16 Co.

17 **Policy Provisions**

18 The issue is whether the Jimmy falls within the
19 uninsured/underinsured motorist (UM/UIM) provision of Surefire's
20 commercial insurance policy governing a "temporary substitute" for
21 a covered automobile. The UM/UIM coverage endorsement obligates the
22 insurer to

23 pay all sums an "insured" is legally entitled to recover
24 as compensatory damages from the owner or driver of an
25 "uninsured motor vehicle." The damages must result from
26 "bodily injury" sustained by the "insured" caused by an
"accident." The owner's or driver's liability for these
damages must result from the ownership, maintenance, or
use of the "uninsured motor vehicle."

1 The policy defines "insured" as

2 Anyone occupying a covered "auto" or a temporary
3 substitute for a covered "auto" ... out of service due to
breakdown, repair, servicing, loss or destruction.

4 CSF ¶ 12 (emphasis added). The term "temporary substitute" is not
5 defined in the policy. The UM/UIM endorsement provides coverage of
6 up to \$1 million per accident. Compare "Temporary Substitute Auto -
7 Physical Damage Insurance" provision, CSF, Exhibit A, p. 32, which
8 provides:

9 If Physical Damage Coverage is provided by this Coverage
10 Form, the following types of vehicles are also covered
"autos" for Physical Damage Coverage:

11 Any "auto" you do not own while used with the permission
12 of its owner as a temporary substitute for a covered
"auto" you own that is out of service because of its:

- 13 a. Breakdown;
- 14 b. Repair;
- 15 c. Servicing;
- 16 d. "Loss;" or
- 17 e. Destruction.

18 (Emphasis added).

19 Discussion

20 Plaintiff's Motion for Summary Judgment

21 Plaintiff Rehak argues that under Hoffman Const. Co. v. Fred
22 S. James & Co., 313 Or. 464, 469 (1992), the governing rule for the
23 construction of insurance contracts is to ascertain the intention
24 of the parties. The term "temporary substitute" is not defined
25 anywhere in the insurance policy. In Hoffman, the Oregon Supreme
26 Court established a sequential test for interpreting the meaning of
27 undefined terms in an insurance policy. Id. at 474. The first step
is to determine the plain meaning of the words. Id. Plaintiff Rehak
asserts that interpretation of "temporary substitute" can be

1 resolved at this level.

2 Plaintiff Rehak cites to Webster's New World Dictionary of the
3 American Language (Second Concise Edition), which defines
4 "substitute" as "a ... thing serving or used in place of another,"
5 and "temporary" as "lasting for only a time; not permanent."
6 Plaintiff Rehak argues that under these definitions, the Jimmy was
7 a temporary substitute for the covered 1995 Ford pickup, because it
8 was being used on October 13, 2004, in place of the 1995 Ford
9 pickup while it was being repaired. Plaintiff points out that the
10 Ford pickup was going to be returned to service as soon as it was
11 repaired, and that Plaintiff Rehak met the definition of "insured"
12 because he was "occupying" the Jimmy during that time.

13 Plaintiff Rehak argues that his interpretation of the UM/UIM
14 coverage endorsement is consistent with other rules of
15 interpretation in that it does not conflict with the other
16 provisions of the policy, is a reasonable interpretation of the
17 provision, and is consistent with the parties' intent, which is the
18 protection of the insured. See Hoffman, at 468-70.¹ Plaintiff Rehak
19 adds that if the provision contains any ambiguity, the ambiguity is
20 to be construed against the insurer. Id. at 470.

21 Defendant's Motion for Summary Judgment

22 Defendant argues that the Jimmy was not a "temporary
23 substitute" auto under the "seminal case," Tanner v. Pennsylvania

24
25 ¹ Defendant agrees that the purpose of the temporary
26 substitute auto provision is to allow an insured, whose vehicle
27 is being repaired, to use a temporary substitute automobile and
have coverage under the policy, citing O'Quinn v. Maryland Auto.
Ins. Fund, 850 A.2d 386, 392 (Md. App. 2004).

1 Threshermen & Farmers' Mutual Casualty Ins. Co., 226 F.2d 498 (6th
2 Cir. 1955). Defendant asserts that this case stands for the
3 proposition that a temporary substitute vehicle must be in the
4 possession or control of the insured.

5 In Tanner, the named insured, Mike Zarzour (brother no. 1)
6 operated a cafe and his brother Louis Zarzour (brother no. 2)
7 operated a different cafe in the same city. When brother no. 1's
8 car was being repaired, he borrowed brother no. 2's Mercury for
9 business errands. Brother no. 1 returned the Mercury to brother no.
10 2, but asked brother no. 2 to get some meat for brother no. 1's
11 cafe. Brother no. 2 went on this errand in the Mercury and also
12 picked up his wife and child. During this trip, brother no. 2 was
13 involved in an accident.

14 The court held that brother no. 2's car was not a temporary
15 substitute auto under brother no. 1's policy because it was not "in
16 the possession or under the control of the insured to the same
17 extent and effect as the disabled car of the insured would have
18 been except for its disablement." 226 F.2d at 500.

19 Tanner differs from this case in some significant respects:
20 first, the named insured, brother no. 1, was not occupying brother
21 no. 2's Mercury at the time of the accident; second, the Mercury
22 was not being used exclusively for brother no. 1's purposes or at
23 his direction; and third, brother no. 2 was not employed by brother
24 no. 1, the insured, nor did he have any interest in brother no. 1's
25 business.

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1 Defendant argues that the "possession and control" test has
2 been applied in other cases, including Carnes v. Schram, 440 NW2d
3 451 (Neb. 1989). But Carnes, like Tanner, is factually
4 distinguishable because there was nothing in the record from which
5 it could be inferred that the vehicle involved in the accident had
6 been loaned to the insured or that the insured had even asked for
7 its use. Nor was the insured occupying the vehicle at the time of
8 the accident.

9 Defendant also cites Deadwiler and Jenkins v. Chicago Motor
10 Club Ins. Co., 603 N.E. 1365 (Ind. App. 1992). That case is
11 distinguishable because 1) the insured was not in the car at the
12 time of the accident; 2) the insured's daughter, who owned the car,
13 was merely performing a favor for her mother, rather than a legal
14 or contractual obligation of the insured, unlike the use of John
15 Rehak's car at Plaintiff Rehak's direction for purposes of the
16 business that employed them both; and 3) while John Rehak was
17 driving the Jimmy as Plaintiff Rehak's designee in this case, the
18 driver of the car in Deadwiler, the insured's daughter's boyfriend,
19 was not driving as the insured's designee.

20 The facts of this case cannot be reconciled to the facts of
21 Tanner, Carnes and Deadwiler because here Plaintiff Rehak was
22 "occupying" the Jimmy at the time of the accident; the Jimmy had
23 been driven by Plaintiff Rehak earlier in the day to the job site
24 and was being used pursuant to Plaintiff Rehak's instructions and
25 for a business purpose at the time of the accident; and the Jimmy
26 was, at the time of the accident, being used in the same way and to

1 the same extent that the 1995 Ford pickup would have been used had
2 it been available that day. There is no evidence that, as in
3 Tanner, the Jimmy was being used for any personal purpose of John
4 Rehak's.

5 The "possession and control" standard advocated by defendant
6 is inapplicable to the facts of this case and would require the
7 court to add terms to the plain language of the policy. I conclude
8 that the Jimmy was being used as a "temporary substitute" auto, so
9 that Plaintiff Rehak was and is entitled to coverage under the
10 UM/UIM provisions of defendant's insurance policy.

11 **Conclusion**

12 Plaintiff's motion for summary judgment (doc. # 11) is
13 GRANTED. Defendant's motion for summary judgment (doc. # 12) is
14 DENIED.

15 IT IS SO ORDERED.

16 Dated this 30th day of April, 2008.

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18 /s/ Dennis James Hubel
19 Dennis James Hubel
20 United States Magistrate Judge
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